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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. A-785

JAMES FRANK NEWMAN, PETITIONER,

versus

STATE OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

The Petitioner James Frank Newman respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of South Carolina entered in this proceeding on 29 October 1973.

OPINION BELOW

The opinion of the Supreme Court of South Carolina, reported in .... S. C. ...., 200 S. E. (2d) 82, appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of the State of South Carolina was entered on 29 October 1973. A timely petition for an order extending the time for filing a petition for Writ of Certiorari to and including April 12, 1974 was granted by Warren E. Burger, Chief Justice of the United

States on February 19, 1974. This Court's jurisdiction is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED

Did the Supreme Court of South Carolina err in affirming the trial judge's refusal of counsel's motion to suppress evidence illegally obtained and his further error in admitting the pistol and cartridges into evidence as they were the products of an unconstitutional search and seizure.

STATEMENT OF THE CASE

On the morning of June 14th, 1972, City Police of the City of Camden, South Carolina, investigated the shooting of one Pelzer McLure. They went to petitioner's home and denying to petitioner that he was accused by them of a crime, received verbal permission to search the premises. Petitioner was not informed that he had a right to counsel but was told when he asked, "Do you think I ought to call my lawyer?" that ". . . as to your lawyer, that's up to you". During the search, petitioner was held in his home by the Chief of Police. When the gun was discovered, he was formally arrested and advised of his rights under *Miranda* standards. Petitioner was subsequently indicted for assault and battery with intent to kill and found guilty of assault and battery of a high and aggravated nature and of carrying an unlawful weapon.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decision of the Supreme Court of the United States as to search or seizure of evidence.

The Supreme Court of South Carolina, in upholding the trial judge's refusal to suppress evidence relied on *Schneckloth v. Bustamonte,* .... U. S. ...., 36 L. Ed. (2d) 854 (1973), to the effect that voluntariness is a question of

fact to be determined from the totality of surrounding circumstances. In this instance, the court ignored the question of validity of the oral consent to search. Petitioner and police were on a first name basis; petitioner questioned as to his need for counsel and, without proper advice, merely acquiesced to the authority of the police. Such search is unlawful, *Amos v. United States* (1921), 255 U. S. 313, 65 L. Ed. 654, 41 S. Ct. 266.

CONCLUSIONS

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of South Carolina.

Respectfully submitted,

KENNETH L. HOLLAND,
H. W. C. FURMAN,
One Lafayette Court,
Camden, S. C. 29020,
Counsel for Petitioner.

12 April, 1974.

Opinion No. 19710

Filed October 29, 1973

AFFIRMED

Holland, Furman & Tetterton, of Camden, for Appellant.

Assistant Solicitor G. Thomas Cooper, Jr., of Camden, for respondent.

BRAILSFORD, A. J.: On this appeal from appellant's conviction and sentence for assault and battery of a high and aggravated nature only two questions are argued in the brief, which we dispose of under headings quoted therefrom.

"The appellant was denied the right to counsel during custodial interrogation."

This ground of appeal is without support in the record, which clearly shows that no interrogation took place until a pistol containing three spent cartridges was found in defendant's car. During the search which resulted in the discovery of this evidence, the appellant and the police chief were seated alone in appellant's dining room, and no interrogation took place. When an officer handed the pistol to the chief, the latter advised the appellant of his rights under *Miranda* standards, and it was only after this was done that he was interrogated and made inculpatory statements. Actually, this sequence of events is not disputed. The defendant's real complaint seems to be that he was not advised of his rights before his consent to the search of his premises was requested by the officers and extended to them. This complaint will be disposed of under the next point.

"The trial judge erred in refusing counsel's motion to suppress evidence illegally obtained, and the trial judge further erred in admitting the pistol, cartridges and towel into evidence since they were the products of an unconstitutional search and seizure."

The victim was appellant's neighbor, and appellant knew that he had been identified to the police as his assailant. When the chief and two police officers arrived at appellant's home at about 6:00 A. M., they requested permission to search his premises for a small caliber weapon. According to their testimony, appellant, who knew the officers and was on a first-name basis with at least one of them. freely and voluntarily granted this request. This evidence is not disputed by appellant who admitted from the stand that he had done the shooting, which he undertook to justify on the ground that he acted in self-defense. The evidence on the voluntariness of appellant's consent was all one way, and amply supported the trial judge's conclusion that the State had met its burden of proof in this respect. The recent decision in *Schneckloth v. Bustamonte,* U. S. ...., 36 L. Ed. (2d) 854 (1973), holds that voluntariness is a question of fact to be determined from the totality of surrounding circumstances, and negated the argument that *Miranda* warnings are prerequisite to proof of effective consent in such cases.

Affirmed.

MOSS, C. J., LEWIS, BUSSEY and LITTLEJOHN, JJ., concur.

I hereby certify that on this 12th day of April, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to G. Thomas Cooper, Jr., Esquire, Professional Building, Broad Street, Camden, South Carolina, Counsel for the Respondent. I further certify that all parties required to be served have been served.

/s/ H. W. C. FURMAN,
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